QUESTIONS PRESENTED

I. WHETHER THE PETITIONER HAS ESTABLISHED THE STATE COURT ERRED IN FINDING UNDER THE TOTALITY OF CIRCUMSTANCES THAT HE WAS PROVIDED CONSTITUTIONALLY ADEQUATE REPRESENTATION AT TRIAL.

II. DID THE SUPREME COURT OF FLORIDA ERR IN FINDING PETITIONER'S CLAIMS THAT MITIGATING EVIDENCE WAS IMPROPERLY EXCLUDED COULD NOT BE RAISED IN THE COLLATERAL PROCEEDING BECAUSE THE CLAIM COULD HAVE AND SHOULD HAVE BEEN RAISED ON HIS DIRECT APPEAL.

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PRELIMINARY STATEMENT

Respondent accepts that portion of the Petition for Writ of Certiorari setting forth the Citations to Opinions Below, Jurisdiction and Constitutional Provisions Involved. The decision of the Supreme Court of Florida sought to be reviewed herein is reported as Cooper v. State, 437 So.2d 1070 (Fla.1983).

STATEMENT OF THE CASE AND FACTS

Petitioner and his accomplice Steve Ellis committed an armed robbery of a grocery store in Pensacola, Florida. Petitioner acknowledged this in his confession to the authorities when apprehended, acknowledged this in his testimony before the jury at his trial and admitted it when he testified at the evidentiary hearing held on his motion to vacate brought pursuant to Fla.R. Crim.P. 3.850. In fact, because of the eyewitness testimony by the victims and in order to keep out adverse evidence, trial counsel stipulated that the robbery occurred.

The trial resolved around the question of whether the petitioner or Steve Ellis was the individual that fatally shot the deputy sheriff who stopped petitioner and Ellis as they were fleeing from the robbery. Witnesses for the State testified they saw a man who met petitioner's physical build leave the driver's side of the sheriff's automobile and enter the passenger side of the vehicle owned by petitioner. When petitioner's automobile was stopped a second time, he was in the passenger's seat. Petitioner offered testimony in an attempt to prove the person seen leaving the patrol car was seen entering the driver's side of his automobile. The weapon found on Ellis after a shootout occurred, during which Ellis was mortally wounded,--a shootout that petitioner initiated by shooting a shotgun at the law enforcement officers through the window of the Camaro--was

not the weapon that caused the death of Deputy Wilkerson. Petitioner attempted to explain this fact away by stating that Ellis had two guns and at Ellis' direction he threw the murder weapon out the window after Ellis shot Wilkerson.

After hearing the evidence, the argument of counsel and instructions to the jury petitioner was found guilty of first degree murder. A sentencing hearing was held to determine the penalty to be imposed wherein certain evidence was excluded by the trial judge on the grounds that it was not relevant or probative. The trial judge although uncertain as to the exact scope of evidence which could be admitted stated that he was going "to be liberal in the introduction of testimony by the defendant so far as character is concerned" (Vol. XIV 26), and in fact admitted most of the evidence that was proffered, including testimony that petitioner was gainfully employed after his release from prison on a prior robbery. There was never any issue raised by counsel that he had a right to introduce evidence beyond that enumerated in the statute. The trial judge excluded testimony proffered to show Ellis dominated petitioner because the witness was not competent to establish that fact.

After hearing the argument of counsel and receiving instructions from the jury, the jury recommended petitioner be sentenced to death. The trial judge entered his written order imposing death and specifically found that the "fatal shots were fired by Cooper." (R 190; App. A, p. 4).

An appeal was instituted to the Florida Supreme Court and that court affirmed the judgment and sentnece. Cooper v. State, 336 So.2d 1133 (Fla.1976) rejecting, among other arguments, the trial judge improperly excluded relevant mitigating evidence. Petitioner sought review in this Court on this very claim and certiorari was denied. Cooper v. Florida, 431 U.S. 925 (1977).

Thereafter the petitioner filed a motion to vacate in the State circuit court claiming counsel was ineffective and a number of other claims not relevant herein. After conducting an evidentiary hearing, reviewing the trial record and receiving written briefs on the issues, the trial judge denied the motion to vacate specifically finding "trial counsel was not ineffective in view of the totality of the trial" and that the trial judge did not improperly exclude any competent, relevant evidence of a mitigating nature which was offered by counsel and that no cause and prejudice had been demonstrated. (Appendix B).

On appeal from the denial of the motion to vacate the Florida Supreme Court affirmed the order of the circuit court. The court found the finding of competency was supported by the evidence and that all other claims were properly rejected because they were matters which could have been raised on direct appeal. Cooper v. State, 437 So.2d 1070 (Fla.1973). Other facts relevant to the disposition of the petition will be included in the argument portion of this response as they relate to the question presented.

WHY THE WRIT SHOULD NOT ISSUE

QUESTION I

DID THE SUPREME COURT OF FLORIDA ERR IN FINDING PETITIONER'S CLAIMS THAT MITIGATING EVIDENCE WAS IMPROPERLY EXCLUDED COULD NOT BE RAISED IN THE COLLATERAL PROCEEDING BECAUSE THE CLAIM COULD HAVE AND SHOULD HAVE BEEN RAISED ON HIS DIRECT APPEAL.

Petitioner contends this Court should grant review in this case because the performance of the "defense attorneys fell far below the minimum standards of representation required by the Constitution." (Pet. at p. 11). Petitioner has not attempted in any way to establish that this case presents a substantial federal question which merits the exercise of this Court's jurisdiction. Rather than even attempting to demonstrate the Florida Supreme Court determined an important federal constitutional question in the instant case, petitioner is merely seeking review to determine whether the Supreme Court of Florida correctly decided whether under the totality of circumstances he received reasonably effective assistance of counsel. Rule 17 of the Rules of this Court and Ross v. Moffitt, 417 U.S. 600, 616-617 (1974) makes it clear that such review is not the function of the Writ of Certiorari. See also: Stern & Gressman, Supreme Court Practice (5th Ed. 1978) pp. 254-317.

Petitioner asserts that he did not receive constitutionally adequate representation at trial because lead counsel: 1) was inexperienced; 2) failed to listen to a tape recording of a police transmission that was important in establishing the amount of time that elapsed between the robbery and the homicide; 3) failed to locate defense witnesses; 4) failed to depose a ballistics expert who was called by the State which allegedly came as a surprise to counsel; 5) failed to investigate an intoxication defense even though he was told by petitioner of it;

6) failed to move for a judgment of acquittal on the robbery charge; 7) failed to file proposed jury instructions including an instruction on circumstantial evidence; 8) failed to request counsel's closing argument thereby precluding appellate issues relating thereto; and 9) failed to object to improper closing argument by the prosecutor.

Nowhere in the petition is it shown how these alleged derilictions adversely affected this petitioner in any way, shape or form--much less prejudiced him in his defense. More importantly, petitioner presumes there was any need for counsel to perform the acts in question.

As to item (1) there was never any dispute between the parties as to how much time elapsed between the robbery and the homicide. It was approximately one-half hour and counsel used this fact in arguing his motion to sever the two charges, which would have eliminated the murder felony theory. Item (2) does not identify what witness or witnesses were not located and no evidence was presented at the hearing to show witnesses existed that should have been called by counsel at trial.

Item (3) is, under the facts of this case, frivolous. All the ballistics expert testified to was that the weapon found on Steve Ellis was not the murder weapon. Counsel already knew this because petitioner told him, as well as the authorities, that Ellis gave him the murder weapon after he (Ellis) shot the deputy and petitioner, at Ellis' directions, threw it out the window as they left the homicide scene (MH 370-371). Petitioner's trial attorney attempted to exclude the evidence at trial on the basis of a violation of Florida's rules of discovery, so that he would be able to argue there was no evidence that Ellis' weapon was not the murder weapon. Of course, because trial counsel's investigator knew of this witness before trial, the witness was allowed to testify by the trial judge, notwithstanding

the technical violation of the rules of procedure, and was sustained on petitioner's direct appeal. Cooper v. State, 336 So.2d at 1138. Since the experts' testimony was consistent with petitioner's version of the events, the failure to depose the witness did not and could not have adversely affected the defense, to-wit: that petitioner participated in the robbery but did not kill Deputy Wilkerson.

The claim that trial counsel did not investigate the alleged intoxication defense is likewise devoid of any merit for counsel testified at the evidentiary hearing that he considered the defense and found it inadequate (MH 187-188; 298-299). Moreover, petitioner's own testimony at said hearing established that he was not intoxicated to the point that a viable defense could have been predicated on intoxication (MH 359-368). Lastly, counsel's defense was that petitioner did not commit the homicide and therefore the defense of intoxication was one which he could legitimately elect not to present.

Petitioner's claim that counsel was ineffective for not moving for a judgment of acquittal on the robbery charge is somewhat incredible since the petitioner himself acknowledged his participation in said robbery. That together with the testimony of the victims of said robbery precluded the granting of such a motion. The undersigned does not understand the law to require counsel to file motions that have no foundation in fact or law. Needless to say, petitioner has not shown that had the motion been made it would have been granted.

Petitioner makes much of the fact that counsel did not request an instruction on circumstantial evidence but neglected to advise this Court that such an instruction was given in this case by the trial judge, which explains why there was no request--it was unnecessary!

Trial counsel's failure to request that his argument be transcribed is not evidence of ineffectiveness. At the evidentiary

hearing trial counsel wasn't even questioned in this regard. More importantly, counsel could not predicate an appellate argument for reversal on anything he said to the jury! As to his failure to object to the closing argument of the prosecutor, petitioner has failed to identify what specific comments should have been objected to. Even so, that omission hardly constitutes a denial of effective representation in petitioner's defense.

Petitioner makes much of the fact that Mr. Grass did not have extensive experience in the criminal law. Lack of experience does not mean an attorney was ineffective. Weinberger v. United States, 559 F.2d 401 (5th Cir.1977). The proper analysis is not counsel's past experience but his actions in representing petitioner in this case.

Petitioner has woefully fallen short of demonstrating the factual finding made by the trial court, which was sustained by the Florida Supreme Court, is not supported by the record. He has not shown any reason why this Court should grant further review in this case. Respondent submits that whether viewed under the test established in Washington v. Strickland, 693 F.2d 1243 (5th Cir.1982), cert.granted, 77 L.Ed.2d 1332 (1983) or the test established in Knight v. State, 394 So.2d 997 (Fla. 1981) and United States v. DeCoster, 624 F.2d 196 (D.C.Cir.1979), the petitioner received constitutionally adequate representation of counsel.

QUESTION II

DID THE SUPREME COURT OF FLORIDA ERR IN FINDING PETITIONER'S CLAIMS THAT MITIGATING EVIDENCE WAS IMPROPERLY EXCLUDED COULD NOT BE RAISED IN THE COLLATERAL PROCEEDING BECAUSE THE CLAIM COULD HAVE AND SHOULD HAVE BEEN RAISED ON HIS DIRECT APPEAL.

Petitioner acknowledges, as he must, that the alleged violation of his right to present relevant mitigating evidence outside the list enumerated in Section 921.141(6), Fla.Stat., was not raised on direct appeal and was raised for the first time in the collateral proceeding instituted pursuant to Fla. R.Crim.P. 3.850. This is evident from the Supreme Court's opinion below as well as the prior petition filed in this Court and the response thereto, Cooper v. Florida, Case No. A-324, wherein petitioner claimed the trial court erred in excluding evidence of mitigation that was relevant to sentencing.

As petitioner has noted, the Florida Supreme Court held in the decision sought to be reviewed that his present claim could have and should have been raised on the direct appeal and since it was not, it was barred from consideration pursuant to Rule 3.850 as interpreted by that court in Witt v. State, 387 So.2d 922 (Fla.1980), cert.denied, 449 U.S. 1067 (1980), and this Court's decision rendered in Engle v. Isaac, 456 U.S. 107 (1982). Those cases of course are predicated upon the legitimate need for finality in criminal cases. It hardly needs to be stated that the scope and extent of state collateral review is uniquely a state law question, not subject to this Court's supervision.

It is therefore uncontradicted that petitioner is guilty of a procedural default and was required to establish both cause and actual prejudice under the Sykes-Engle doctrine before he was entitled to relief.

Petitioner urges that cause is established by the fact that Lockett v. Ohio, 438 U.S. 586 (1978), which was decided after his direct appeal was disposed of, changed the law of Florida and if it did not, counsel was ineffective for being ignorant of the law. Respondent submits this argument, aside from being contradictory, is not well-founded.

First, the Supreme Court in Songer v. State, 365 So.2d 696 (Fla.1978), cert.denied, 441 U.S. 956 (1979) and in the opinion rendered in this case held Lockett did not change the law in Florida. Indeed, this Court in Lockett, citing to Proffitt v. Florida, 428 U.S. 242 (1976) recognized that the range of mitigating factors listed in the statute was not exclusive. 438 U.S. at 606, 57 L.Ed.2d at 991, no. 4. Secondly, the Florida statute itself makes that evident for in addition to the fact that it states the aggravating circumstances are limited and no such limitation appears with regard to the list of mitigating factors, the statute, at the time of petitioner's trial and appeal, clearly and unequivocally stated:

> In the proceeding [sentencing], evidence may be presented as to any matter that the court deems relevant to sentence, and shall include matters relating to any of the aggravating or mitigating circumstances enumerated in subsections (6) and (7).

Respondent submits the language from Section 921.141(1) quoted above makes it rather clear that any mitigating evidence relevant to the sentence was admissible and that counsel for petitioner had the "working tools" to argue on direct appeal that the evidence proffered was admissible even though it did not fall within the ambit of the enumerated mitigating circumstances. Interestingly, other attorneys had argued this point and in Messer v. State, 330 So.2d 137 (Fla.1976), it was successfully argued that the trial judge erred in excluding the penalty imposed on a codefendant at Messer's sentencing hearing. The penalty imposed on a codefendant, of course, is not an enumerated mitigating circumstance under Section 921.141(6, Fla.

Stat. Messer was decided by the Supreme Court of Florida prior to the date petitioner's direct appeal was disposed of. See also: Songer v. State, supra, and the cases cited therein.

Inasmuch as counsel for petitioner had the tools to construct the claim belatedly tendered, the fact that Lockett was decided subsequent to his direct appeal does not constitute "cause" for the appellate default. Engle v. Isaac, supra, at 804. The Eleventh Circuit Court of Appeals has also recognized that even when the constitutional law has not been decided by this Court, if the "building blocks" for a particular claim are available, failure to raise the issue on appeal will not constitute cause for procedural default. Ford v. Strickland, 696 F.2d 804, 816 (11th Cir.1983) and Antone v. Strickland, 706 F.2d 1534, 1537 (11th Cir.1983).

Counsel's assertion that cause for the appellate default is satisfied by the now familiar claim of ineffective assistance of counsel is totally devoid of any legal merit, which is why no authority has been cited to support such a contention. In Engle itself this Court appreciated the fact that counsel might overlook a claim and, in fact, that not every astute attorney might perceive a constitutional claim, however, the Court properly noted that the ". . . Constitution guarantees criminal defendants only a fair trial and a competent attorney [and] . . . does not insure that defense counsel will recognize and raise every conceivable constitutional claim. . ." 456 U.S. at 734, 71 L.Ed.2d at 804. The Court thus concluded that ". . . Where the basis of a constitutional claim is available, and other defense counsel have perceived and litigated that claim, the demands of comity and finality counsel against labeling alleged unawareness of the objection as cause for procedural default. . ." 456 U.S. at 134, 71 L.Ed.2d at 804.

Numerous circuit courts of appeal have rejected the spurious argument that the failure of counsel to properly present a claim

which results in a procedural default cannot be termed "ineffective assistance" so as to establish "cause" which excuses the default. Lumpkin v. Ricketts, 551 F.2d 680 (5th Cir.1977), cert.denied, 434 U.S. 957 (1977); Washington v. Estelle, 648 F.2d 276 (5th Cir.1981) and the cases cited therein; Cooper v. Fitzharris, 586 F.2d 1325 (9th Cir.1978), cert.denied, 440 U.S. 974 (1979); Indiviglio v. United States, 612 F.2d 624 (2d Cir. 1979), cert.denied, 445 U.S. 933 (1980) and Jones v. Jago, 701 F.2d 45, 47 (6th Cir.1983); Birt v. Montgomery, 709 F.2d 690 (11th Cir.1983) and Sullivan v. Wainwright, 695 F.2d 1306 (11th Cir.1983). All of the aforementioned decisions recognize that the adoption of such a concept would "effectively eliminate any requirement of showing cause at all." Lumpkin, supra, at 683 and would circumvent Engle. Jones v. Jago, supra, at 47.

Respondent submits that the petitioner has not demonstrated the requisite cause for the appellate procedural default and thus the Court should not consider whether he has demonstrated actual prejudice. Moreover, the respondent submits no such showing could be made on this record for the excluded evidence was not competent or relevant. Petitioner's prior employment was allowed into evidence during the guilt phase of his trial and thus it was before the jury. As to his marital plans and relationships, respondent submits this evidence is irrelevant and nothing more than an appeal to the sympathy of the jury. The evidence relative to his codefendant's propensity for violence is not a matter which is relevant to petitioner's character and thus not covered by Lockett. It should be remembered the trial judge found as a fact that petitioner fired the fatal shot. Whether Steve Ellis was more violent than petitioner simply is beside the point, and the exclusion of evidence to that effect does not constitute a fundamental constitutional defect in the sentencing proceeding that would require the sentence of death be vacated.

CONCLUSION

Petitioner has failed to demonstrate any substantial federal question exists which merits the exercise of this Court's discretionary review. Accordingly, the Petition for Wirt of Certiorari should be denied.

Respectfully submitted,

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COUNSEL FOR RESPONDENT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Response has been forwarded to Mr. Randy Hertz, 704 Fifth Street, S.E., Washington, D. C. 20003, via U. S. Mail, this 14th day of December 1983.

Raymond L. Marky

Raymond L. Marky
Assistant Attorney General

APPENDIX A

IN THE CIRCUIT COURT IN AND FOR ESCAMBIA COUNTY, FLORIDA

STATE OF FLORIDA,

Plaintiff,

vs.

CASE NO. 74-185

VERNON RAY COOPER,

Defendant.

11-3-80

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ORDER DENYING
MOTION TO VACATE

A careful review of the transcript of the evidentiary hearing and the major portions of the trail transcript have been made to determine whether the interest of justice requires a new trial, with the result that I find no reversible error is made to appear, and the evidence in the record does not reveal that the ends of justice require that a new trial be awarded.

FINDINGS:

1. As to the first allegation of the Motion to Vacate, it is determined from a review of the transcript that the trial judge permitted all mitigating evidence that defense counsel submitted, including totally irrelevant evidence in mitigation, be presented to the jury. Defendant's counsel has extracted from the cases cited in support of the motion factual bases that are totally irrelevant to the instance offense and sentence. The dominance of Defendant was not substantiated by the defense witnesses who testified at the trial. Intoxication was not made an issue at the trail of the case and would only have been injected in the sentence phase to "muddy the water".

2. As stated in the above paragraph, Defendant's second allegation is determined to be inapplicable as Defendant's counsel was permitted to introduce mitigating circumstances that were considered relevant evidence and was not restrict in presenting same to the jury. Defendant has not established any cause and prejudice. Defendant was permitted to introduce

evidence from members of the Defendant's family and his girl friend as mitigating factors.

3. The third allegation of Defendant's motion is without merit. The Court's instructions to the jury has already been resolved by the Florida and U. S. Supreme Court, and this Court will not permit Defendant's counsel to replow ground that has already been plowed.

4. I find this contention in Paragraph Four of the motion was a matter which could have been raised on direct appeal and thereby is unavailable in a collateral attack on the judgment. Meeks v. State 382 So2nd 673.

The fact that the Defendant's collateral attack is alleged to be one of constitutional dimension does not preclude a waiver by the failure to assert it on direct appeal.

5. Defendant failing to offer any argument on Paragraph Five of his motion, the same is deemed waived and will be dismissed.

6. Defendant's Paragraph Six and Seven have been passed on by the Florida Supreme Court on direct appeal, and the Court will not substitute its judgment in lieu of the Supreme Court's decision. Sullivan v. State 372 So2nd 938.

7. A review of the trial transcript reveals that the trial counsel was not ineffective in view of the totality of the trail, as stated in McKenna v. State 280 F2nd 592.

"We interpret the right to counsel as the right to effective counsel. We interpret counsel to mean not errorless counsel, and not counsel judged ineffective by hindsight, but counsel reasonably likely to render and rendering reasonably effective assistance."

8. The Defendant's motion alludes to ineffectiveness of counsel for trial counsel's failure to seek a stipulation from the State for the use and introduction of a polygraph examination.

It has repeatedly been held by the courts that polygraph examinations are inadmissible as irrelevant evidence.

9. This allegation of the motion, failure to object to inflammatory remarks made by the State Attorney requires no review, as Florida has consistantly held that same are waived when not objected to at trial.

10. Defendant's allegation as to trail counsel's failure to plea bargain is refuted by the record. The record reflects that the defendant rejected plea negotiations as propsed by the State.

The remaining allegations of Defendant's motion is totally without record evidence and are refuted by the trial transcript which are attached hereto and hereby made a part hereof by said attachment.

The Court having thoroughly considered said Motion to Vacate, it is

ORDERED that Defendant, VERNON RAY COOPER'S, Motion to Vacate be and the same is hereby denied.

DONE AND ORDERED at Pensacola, Escambia County, Florida this 23 day of October, 1980.

Jack H Hancock
CIRCUIT JUDGE

Copies to:

Curtis A. Golden, State Attorney
First Judicial Circuit

Raymond L. Marky
Asst. Attorney General

Judith J. Doughtery,
Asst. Public Defender

...TIFIED TO BE A TRUE COPY OF THE
ORIGINAL ON FILE IN THIS OFFICE
...NESS MY HAND AND OFFICIAL SEAL

LONNIE LEE MAGAHA
CLERK CIRCUIT COURT
ESCAMBIA COUNTY, FLORIDA

By: _____ D. C.